

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
State of Wisconsin – Educational Communications Board)	
)	
v.)	CSR 6175-M
)	
DIRECTV, Inc.)	
)	
Request for Mandatory Carriage of Television Station WPNE(TV), Green Bay Wisconsin)	

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 2003

Released: October 8, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. State of Wisconsin – Educational Communications Board (“WECB”), licensee of noncommercial television station WPNE(TV), Green Bay Wisconsin, (“WPNE”) filed the above-captioned must carry complaint against DIRECTV, Inc., pursuant to Section 338 of the Communications Act of 1934, as amended (the “Act”), and Section 76.66 of the Commission’s rules for its refusal to carry the signal of WPNE on its satellite system.¹ WECB states that DIRECTV is providing “local-into-local” satellite service pursuant to the statutory copyright license in the Green Bay, Wisconsin DMA.² In its complaint, WECB alleges that DIRECTV has failed to meet its must carry obligations under the Commission’s satellite broadcast signal carriage rules.³ DIRECTV filed an opposition to the complaint and WECB filed a reply. For the reasons discussed below, we deny the complaint.

¹ 47 U.S.C. §338; 47 C.F.R. § 76.66; *See* Public Notice, Special Relief and Show Cause Petitions, Report No. 0079, dated June 13, 2003.

² *See* 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides “local-into-local” satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

³ Under Section 76.66(m)(3) of the Commission’s rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a “complaint” with the Commission in accordance with Section 76.7. 47 C.F.R. § 76.66(m)(3). Although styled a “complaint,” a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission’s pleading requirements. *See 1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999).

II. LEGAL BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),⁴ required satellite carriers, beginning January 1, 2002, to carry on request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁵ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁶ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁷

3. Under the Commission's broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.⁸ In DMAs where a satellite carrier launches new local-into-local service, the carrier must notify local television stations in writing of its intent to provide such service at least 60 days in advance and identify the location of its local receive facility.⁹ Upon receipt of this notice, local television stations must request carriage within 30 days.¹⁰ If a satellite carrier denies a local station's carriage request, it must notify the station within 30 days of its receipt of the carriage request.¹¹ Otherwise, local television stations must be carried by the later of 90 days from the satellite carrier's receipt of the station's election request or upon commencing local-into-local service in the new television market.¹²

III. DISCUSSION

4. The following facts are undisputed by the parties. On March 12, 2003 DIRECTV mailed its notice of intent to launch local-into-local service in the Green Bay DMA to WPNE.¹³ The notice was sent to an address on Nicolet Drive in Green Bay that DIRECTV states it obtained from a Verizon Internet

⁴ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁵ See 47 U.S.C. § 338.

⁶ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Broadcast Carriage Report & Order"); 47 C.F.R. § 76.66(e) ("A local market in the case of both commercial and noncommercial television broadcast stations, is the designated market area in which a station is located, and [i]n the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) [i]n the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.").

⁷ See generally *DBS Broadcast Carriage Report & Order*, 16 FCC Rcd at 1918. The Commission later affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Broadcast Carriage Reconsideration Order").

⁸ See 47 C.F.R. § 76.66.

⁹ See 47 C.F.R. § 76.66(d)(2); see also *DBS Broadcast Carriage Report & Order*, 16 FCC Rcd at 1933.

¹⁰ See 47 C.F.R. § 76.66(d)(2).

¹¹ *Id.*

¹² See 47 C.F.R. § 76.66(d)(2)(iii); see also *DBS Broadcast Carriage Reconsideration Order*, 16 FCC Rcd at 16577.

¹³ Complaint at 2.

“yellow page” service.¹⁴ The notice was addressed to Kay Klubertanz as station general manager and was received at the Nicolet Drive address on March 13, 2003.¹⁵ On March 21, 2003, the notice was passed on to a WECB employee at a WECB board meeting.¹⁶ DIRECTV states that its representative contacted the station on April 16, 2003 to discuss possible negotiated carriage since the station had not elected mandatory carriage.¹⁷ By letter to DIRECTV dated April 18, 2003, WECB requested must carry status for WPNE.¹⁸ DIRECTV did not respond in writing to WECB’s letter.¹⁹

5. WECB states in its Complaint that DIRECTV sent the notice of intent to launch local-into-local service to the wrong address. It asserts that the correct address for the station is that of the licensee, WECB, in Madison, Wisconsin.²⁰ According to WECB, Nicolet Drive is the address of the University of Wisconsin’s Green Bay campus production unit and Ms. Klubertanz is a video producer at the university. WECB further states that its only local presence in Green Bay is the WPNE transmitter which is not on Nicolet Drive. WECB argues that because no station employee or representative actually received DIRECTV’s notice until March 21, its response to that notice on April 18 was within 30 days and thus timely under our rules.²¹

6. DIRECTV, on the other hand, argues that its decision to mail the notice to the Nicolet Drive address was reasonable. DIRECTV asserts that the Verizon directory is a reliable source and that it called the number listed in the directory to confirm the address and the name of the station manager.²² Further, DIRECTV argues that regardless of what address it used, WECB had actual notice of DIRECTV’s intent to launch local into local service on March 21, only eight days after the notice was sent, and twenty two days before the deadline to respond.²³

7. The Commission has not established an “official address” policy for purposes of DBS must carry election notices.²⁴ Instead, we examine the particular circumstances presented to determine whether the satellite carrier acted reasonably in fulfilling its notice obligations.²⁵ We find that DIRECTV acted

¹⁴ Answer at 3.

¹⁵ Complaint at 3; Answer at Exhibit 2.

¹⁶ Complaint at 3.

¹⁷ Answer at 10. A retransmission agreement has not been reached.

¹⁸ Answer at 10.

¹⁹ Complaint at 4. A satellite carrier’s failure to respond to a request for mandatory carriage within 30 days can be considered a denial for purposes of allowing the television station to file a complaint. *DBS Broadcast Carriage Reconsideration Order*, 16 FCC Rcd at n.220.

²⁰ WECB states that this is the “official” address of WPNE shown in the Commission’s records. Complaint at 7.

²¹ Complaint at 3. WECB makes unsubstantiated allegations of bad faith on the part of DIRECTV that we will not address here.

²² Answer at 2. WECB counters that the employee who answers the telephone number listed for WPNE in the Verizon directory answers as Wisconsin Public Television, not WPNE. Reply at 3. Further, WECB states that if a DIRECTV employee called, he or she could have mistakenly confused the address and manager of the Wisconsin Public Television production unit for the address and manager of WPNE. *Id.* DIRECTV states that it called the number listed by Verizon again in May 2003, the telephone was again answered as WPNE, and the station’s address and station manager were again confirmed. Answer at 3 n.7.

²³ Answer at 3.

²⁴ *Ho’Ana’Auao Community TV, Inc. v Echostar Communications Corporation*, 18 FCC Rcd 2487, 2489 (2003); *Entravision Holdings, LLC v Echostar Communications Corporation*, DA 03-2935 (released September 21, 2003).

²⁵ *Id.*

reasonably in the particular circumstances presented by this case. The record shows that when “WPNE” is entered in the search function of the Verizon Directory, only the Nicolet Drive address is listed. The same address is listed for Wisconsin Public Television.²⁶ Although there is some dispute about how the telephone number listed in the directory is answered, WECB states that it is answered as Wisconsin Public Television, an entity which certainly has a relationship to WPNE.²⁷ The notice was addressed to WPNE to the attention of Ms. Klubertanz and was received and signed for at Nicolet Drive. No one at the Nicolet Drive facility contacted DIRECTV to indicate that the notice had been misdirected. Instead, the notice was given to a WECB employee shortly after it was received. Regardless of what address was used, it is undisputed that a WECB employee was in possession of DIRECTV’s notice of its intention to begin local into local service at least three weeks before the deadline to respond. WECB offers no explanation of why it did not respond within these three weeks nor does it indicate that it attempted to contact DIRECTV about using an incorrect address or to request an extension of time. In fact, WECB did not respond until DIRECTV called the station on April 16, several days after the deadline, and did not send an election until April 18, two days after talking with DIRECTV. We find under these circumstances that DIRECTV was justified in believing it had fulfilled its notice obligations and WECB’s complaint is therefore denied.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66(d)(2)(ii) of the Commission’s rules, 47 C.F.R. § 76.66(d)(2)(ii), that the must carry complaint filed by State of Wisconsin – Educational Communications Board, licensee of non-commercial television station WPNE(TV), Green Bay, Wisconsin, against DIRECTV **IS DENIED**.

9. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission’s rules, 47 C.F.R. § 0.283.

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William H. Johnson
Deputy Chief, Media Bureau

²⁶ Answer at Exhibit 1.

²⁷ See Complaint at 2 (WECB states that five stations, including WPNE, comprise the Wisconsin Public Television Network).